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Major Trends in EEOC Policy and Enforcement

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before the
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HOUSTON, TEXAS

November 16, 1981

"MAJOR TRENDS IN EEOC POLICY AND ENFORCEMENT"

My topic this morning is "Major Trends in EEOC Policy and Enforcement. In connection with this theme, the thought I want to impress upon you is that the Equal Employment Opportunity Commission is alive and well, but that the Commission is embattled on many fronts.

The Commission is continuing to process and resolve administrative charges at a record rate; rapid charge processing is in place and working; the Commission's litigation program is vigorously moving against the most egregious discriminators and Commission attorneys are securing substantial monetary benefits from employers and unions for the victims of discrimination.

Yet, despite these apparent signs of Commission vitality; there is an air of pessimism lingering over the civil rights community and those in the business community who are committed to the concepts of equal employment opportunity. My purpose this morning is to report to you on the state of the Equal Employment Opportunity Commission and the issues confronting this--the lead civil rights agency in the Federal government. You decide whether the pessimism is warranted.

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1. Background - As you are undoubtedly aware, the Commission's major responsibility is to administer and enforce three fair employment statutes and one Presidential Executive Order. The bulk of our work falls under one statute--Title VII of the Civil Rights Act of 1964, as amended. Title VII prohibits race, sex, national origin and religious discrimination in every conceivable phase of employment. It is a comprehensive statute applying to every business with 15 employees, to unions and employment agencies. The statute declares it unlawful to discriminate on the basis of race, sex, national origin, and religion in hiring and promotion practices, wages, discipline and firings and all terms and conditions of employment. Last year the Commission received approximately 40,000 Title VII charges for processing.

The Commission also enforces the Equal Pay Act which contains one prohibition. It is unlawful for an employer to pay different wages for men and women where both sexes are performing substantially the same jobs.

The fastest growing area under EEOC's jurisdiction is the Age Discrimination in Employment Act. This statute prohibits discrimination by both public and private employers against all employees and applicants between the ages of 40 and 70. Since the Commission assumed jurisdiction over age discrimination from the Department of Labor in 1979, the number of administrative complaints filed has more than doubled from 3,097 filed in Fiscal 1979 to 8,779 in Fiscal 1981. It is of more than passing interest to note that the majority of age discrimination complaints are filed by non-minority males.

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The Commission also has responsibilities under Executive Order 12067. This Executive Order makes EEOC the lead federal agency on equal employment matters and directs other agencies to coordinate their guidelines and regulations on fair employment matters with EEOC. EEOC reviews other agency issuances to make sure that they are not burdensome, duplicative, or inconsistent with existing policies. Under this Order, many Commission reviews involve coordinating the Department of Labor's OFCCP regulations some of which I'll speak about later in more detail.

2. Charge Processing - Any discussion of EEOC policies must begin with charge processing. EEOC is a charge oriented agency. Our workload is determined by the number of employees and job applicants who come to us claiming they have been denied a job or some other aspect of employment opportunities because of one of the prohibited bases. In the past, EEOC had the reputation as an agency burdened with a backlog of charges. We were known for slowness. Those of you who follow EEOC also know that there has been a dramatic turnaround at this agency and infact only this summer OMB and the General Accounting Office lauded EEOC's charge processing procedures and stated that we were a model for other federal agencies to follow.

Our fiscal year ended September 30th and as of yet our fourth quarter production figures are still not final. However, production figures for the first three quarters of FY-81 indicate that the the Commission received for processing 40,293 charges. Dur-

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ing that same period, our field offices resolved 54,482 charges or 35% more charges than we have taken in. This represents a one-third increase in production over comparable figures for Fiscal Year 1980.

In the Title VII area, the Commission took in 31,751 charges and resolved 45,456 or almost 45% more than we took in. The Commission's Title VII backlog, which stood at almost 70,000 charges as of January 1979, is now below 24,000 charges.

Most important, Commission procedures continue to provide charging parties with substantial relief. Despite the extraordinary number of charge resolutions, the Title VII rapid charge settlement rate is holding at 43%. The settlement rate for Age discrimination charges has risen to 25% and Equal Pay settlements have gone up to 27%.

Through nine months of 1981, approximately \$60 million in relief was obtained for 36,682 people. These figures which are for only three quarters of FY-81 exceed benefits attained for all of Fiscal 1980.

The problem facing EEOC in connection with charge processing in the near future is that undoubtedly the number of charges filed with the agency will dramatically grow. Our experience has been that when there is an economic downturn there is heightened sensitivity to protecting one's job and this is reflected in increased charge filings. The more workers who are furloughed, laid off, or fired the more charges this agency will find at its doorstep. Even if our productivity increases, slowdowns in charge processing are

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possible, especially if EEOC is forced to take a further reduction in funding.

3. Commission's Litigation and Systemic Program - Over the past year, the Commission's litigation and systemic program have come into their own. Although refinements are still required, the Commission's litigation program is potent and effective. At the end of FY-81, EEOC was the plaintiff in approximately 850 suits, an all time agency high. Approximately a third of these suits seek extensive class relief. It is also significant that in FY-81, the EEOC filed 89 age discrimination suits. This is the largest number of suits that the government has ever filed under this statute and reflects the growing activity in this area.

The Commission is securing record amounts of backpay in many of the cases we are litigating. For example, on September 11, 1981, EEOC reached an agreement with Nabisco, Incorporated, who agreed to establish a settlement fund for the benefit of a nationwide class of female bakery employees. The settlement, upon final approval by the District Court in Pittsburgh, Pennsylvania, will exceed \$5 million. Aside from the monetary benefits the Commission secured, we also extracted a pledge from the company that it would modify its job assignment practices, post job openings plant wide, take steps necessary to discourage the harassment of female employees, and a host of other initiatives.

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The settlement may impact on as many as 8,000 female employees and will cover eleven bakeries across the country.

Last summer, the Commission also signed a settlement agreement with Sears, Roebuck and Co., that resolved four EEOC race discrimination suits against this nation's largest retailer. The terms of the agreement were directed at insuring that Sears would implement procedures to monitor its own hiring practices in ways that should assure compliance with the law. We believe then and now that the agreement will enhance minority opportunities at Sears, and we hope to observe signs that will justify that belief in the near future.

EEOC also has a nationwide sex discrimination suit against Sears which of course is unaffected by the settlement I just mentioned. The nationwide sex discrimination suit has been set for trial in June 1982. Preparation for this trial has been a major activity for the past six months.

The Office of Systemic Programs presents potential charges to Commissioners for their signature. Accompanying the proposed charges is information prepared by the Office of Systemic Programs explaining why that office believes a Commissioner's charge is justified. During the latter half of FY-81, OSP issued 23 Commissioner's charges.

Of the 104 charges issued prior to FY-81, 20% have now been fully investigated, most of these in the past six months.

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During the 4th quarter of FY-81, the Commission issued its first 7 decisions based on systemic charges and achieved settlement of one additional charge. The 7 decided charges are now in conciliation, and will either result in settlement or be referred for litigation shortly. An additional 8 charges have been fully investigated, with decisions drafted, but are being held pending settlement discussions and 4 other decisions are presently undergoing headquarters review. Moreover, a number of charges pending in the investigative phase are the subject of ongoing settlement discussions.

The Office of Systemic Programs has also recently settled a lawsuit against the Alabama Power Co. and the IBEW for approximately 2.2 million dollars and increased job opportunities for minorities and women, company-wide. Earlier in 1981, the Office of Systemic Programs entered into a 1.1 million dollar settlement with the Commonwealth Oil Refining Company (CORCO) of Puerto Rico for national origin discrimination.

4. Budget - No issue has warranted more attention than our proposed FY-82 budget. Originally OMB planned to fund EEOC at 140 million dollars for FY-82 and then approximately six weeks ago we were informed that the recommended funding would be at 123 million dollars. Funding at the 123 level would seriously impair our rapid charge processing procedures, curtail the effectiveness of our litigation programs, and force the Commission to make less funding and support available for state and local

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fair employment agencies. Funding at the 123 million dollar level translates into:

- (1) EEOC losing approximately 405 staff years or 13% of our personnel and;
- (2) Funds earmarked for state and local agencies most likely being reduced from 19 million dollars to 16-1/2 million dollars.

These reductions will adversely impact the Commission's overall operations because EEOC will simply be unable to process Title VII, ADEA and Equal Pay Act (EPA) complaint inventories within a reasonable time. Specifically, the Commission's inventory of Title VII complaints will grow by 65 percent, from 37,000 complaints, or 8-1/2 months of workload, to 62,200 complaints, or 12 months of workload during FY-82. Moreover, without adequate resources, the Commission will not be able to eliminate the pre-1979 Title VII backlog by the end of 1983 as planned. In addition, ADEA complaints will rise by over 50 percent to 10,000 complaints, or a 13-month inventory by the end of FY-82; EPA complaints will rise by 40-45 percent to 2700 complaints, or a 15-month inventory by the end of FY-82. Those of you representing state and local Fair employment Practices Agencies should be aware that we project your inventory to rise from 36,000 complaints to 48,000 complaints nationwide.

In the area of fair employment law, one of the few axioms simply not open to dispute is that the longer an agency takes

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to process a discrimination charge the more difficult it is to voluntarily resolve it. Every analysis the Commission has conducted shows that without speedy processing of a charge there is little likelihood of settlement. At the 123 million dollar budget level the time frame for processing charges will be lengthened--in some cases doubled--and therefore the Commission's staff predicts that voluntary settlement rates will drop sharply. This of course will have a serious affect on all segments of our society but most profound on charging parties who have been victimized by discrimination. Their wait for the government to investigate a dispute will be legthened, their pain, alienation, and sense of hopelessness heightened. The employer community will also be adversely impacted by delayed processing. Companies will now have to keep outstanding charges on their books longer. This means that rather than resolving a charge quickly, businesses will have to retain records, supporting evidence, and files longer until the Commission reaches that charge and begins processing it. Delay will also cost businesses directly. If the employer has erred in making an employment decision then its liability rather than being terminated quickly at an early settlement conference instead will continue to run making it liable for ever increasing amounts of backpay.

Finally, delay in processing charges will also adversely affect our judicial system. Charging parties frustrated with EEOC's seeming inability to timely process their charges will

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simply extricate themselves from the administrative process and file suit directly. Charging parties will flood the courts causing court dockets to become even more crowded. Truly, in every sense of the word, delayed charge processing is justice denied ~~and~~ to business and to the charging party.

6. Affirmative Action - The issue of affirmative action generates more emotion and controversy than any other in contemporary civil rights. Its future, as of late, has been somewhat muddled but I can tell you that at the agency designated to lead the fight against employment discrimination it is still a viable concept which we at the EEOC vigorously support.

Under Title VII, affirmative action operates in one of two ways. There is voluntary affirmative action and that of course was the setting in the United Steelworkers v. Weber case. Under voluntary affirmative action, an employer undertakes on its own initiative to remove certain barriers which the employer itself has identified as a barrier to equal opportunity. The employer recognizes that there is an underrepresentation of minorities or women in its workforce and that this may have been caused consciously or not by discrimination. The employer then takes steps it believes appropriate to correct the underrepresentation. These steps can include special training programs

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and recruitment and outreach programs all targeted to increase the representation of the group which is underrepresented. Employers frequently undertake affirmative action because they recognize that it is in their own self interest to formulate their own remedy rather than the government or a private charging party taking them to court and a remedy being formulated in that forum.

EEOC, three years ago, issued guidelines on affirmative action so as to educate employers on how to conduct these remedial programs and at the same time protect themselves from so called "reverse discrimination claims." In a nutshell, the guidelines state that affirmative action plans should be narrowly tailored to the particular problem of underrepresentation. If the problem is an underrepresentation of minority managers it is inappropriate to develop a program which will result in more minorities in staff positions. The program should not be overly broad and it should not unnecessarily trammel the rights of the majority. Affirmative Action plans also should have fixed time limits. When a certain goal is achieved the special remedial program should terminate. The whole thrust of the guidelines is that the steps taken should be reasonable in relation to the perceived problem.

The other form of affirmative action which EEOC has also had experience with is court imposed or mandatory affirmative action. If EEOC or a private charging party prevails in a lawsuit and convinces the judge that the employer discriminated, courts may

impose a numerical goal on the employer until a certain degree of representation of minorities or women is achieved. The court has equitable powers to order this relief and if the court deems it appropriate, it exercises this authority.

At this moment, confusion over the future of affirmative action stems from a statement made by a senior official in the Department of Justice. As many of you are aware, Justice has limited responsibility in the enforcement of Title VII. Whereas EEOC has responsibility for almost all private employers and the entire federal workforce, DOJ's enforcement authority extends only to state and local governments.

The Commission was somewhat surprised when at a recent Congressional hearing, the Assistant Attorney General for Civil Rights at the Department of Justice declared that Justice would "no longer...support the use of quotas or any other numerical or statistical formulae" as a remedy in Title VII actions. To begin with, this breaks with a long precedent of cases in which the courts have uniformly endorsed this specific form of relief. Indeed, as long as 15 years ago the courts declared that when an employer discriminated against blacks it was necessarily discriminating against a class of individuals and therefore relief for the entire class and not just for the identified victims was appropriate. Moreover, anyone acquainted with large Title VII suits knows that in many instances it is impossible to identify all the victims of discrimination. As a

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practical matter it simply cannot be done and that is precisely the reason flexible hiring or promotion goals have been utilized.

At this time, EEOC continues to believe that in some cases individual remedies are insufficient to satisfy the "make whole" requirement of Title VII relief and that numerical goals and formulaes are still necessary to eliminate employment discrimination "root and branch." This does not mean that EEOC will seek a numerical goal in every case which we file.

Commission attorneys seek numerical goals and timetables only in those cases where that relief is appropriate, that is in instances where it is necessary to make the class "whole." It is significant that a recent poll revealed that the American people still feel that the continuing discrimination and pervasive employment disadvantages suffered by minorities and women--which underlie existing EEO law--has not so drastically changed that Title VII and its affirmative relief are no longer critical to ensuring equal opportunities.

There is one other aspect of affirmative action warranting discussion. In 1978 Congress transferred from the then Civil Service Commission--now the Office of Personnel Management (OPM)--to EEOC authority to monitor federal agency affirmative action plans. Following the Assistant Attorney General's statement to Congress that Justice no longer would support goals, he wrote a letter to me explaining that he thought EEOC, in exercising its affirmative action responsibilities over federal agencies,

should not fasten employment goals and timetables on federal agencies. Although this letter was addressed to me in my capacity as Acting Chairman of the EEOC, and no cc's were shown, he nonetheless sent copies to all other federal agencies. This led to confusion among federal agency officials regarding what was happening to the government's own affirmative action program. Several officials called or wrote to EEOC explaining that they had received the Justice Department letter and wanted to know if their affirmative action plans were to continue containing goals and timetables. The Commission has informed our sister agencies and the Assistant Attorney General for Civil Rights at the Department of Justice that the concept of goals and timetables is still operative; that it conforms to statutory and constitutional norms; and that goals and timetables are nothing new but were instruments fully endorsed by the Civil Service Commission as early as 1972.

7. The Uniform Guidelines on Employee Selection Procedures -

Another area of recent controversy is the Commission's Uniform Guidelines. As most of you are aware, these Guidelines were agreed to by the other federal agencies with equal employment responsibilities such as Justice, the Department of Labor, and OPM. These guidelines spell out under what circumstances the government feels employment selection devices such as tests may be unlawful. Of course, Title VII does not forbid employers to use tests or other selection procedures, even when they adversely affect the employment opportunities of minorities and

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women. What it does do is to provide that, if the use of these tests results in adverse impact, the employer must justify their use by showing that they are manifestly related to job performance. If the employer cannot make this showing, then use of the selection device in question is prohibited as discriminatory.

Through the Uniform Guidelines the government has attempted to provide guidance to employers and others as to what constitutes "adverse impact" and "job relatedness", or "validity." The Uniform Guidelines contain technical standards as to how to conduct and evaluate validity studies.

I should emphasize that the inclusion of these technical standards in the Uniform Guidelines was not intended to dictate professional standards. The technical standards are intended to be consistent with professional psychological standards, and we have turned to the psychological profession itself for guidance. After reviewing the UGESP, the APA Committee on Psychological Tests and Assessment stated on February 11, 1980, that the uniform Guidelines have attained consistency with the standards /i.e. the 1974 revision of APA's published standards/ in those areas in which comparisons can be meaningfully made."

As some of you may know, the psychological profession is in the process of reviewing its published standards to determine whether developments in research and in practical experience mandate changes in those standards. A joint committee, consisting

of representatives of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education, has been formed to consider these developments, prepare a draft of new joint technical standards, hold open hearings on this draft and adopt new standards by the end of next year. The U.S. Office of Personnel Management has written this committee suggesting specific changes in the standards which would weaken them. The American Society for Personnel Administration has just published a report by a group of lawyers and psychologists working for major corporations and test publishers and distributors, called "Professional and Legal Analysis of the Uniform Guidelines in Employee Selection Procedures." This report also advocates "professional standards" which are much weaker than those contained in American Psychological Association's currently published and effective standards.

There has been some suggestion that, because some feel professional standards are changing, the Uniform Guidelines should be revised to reflect these changes, and that such revisions should be undertaken right now. The Commission rejects the notion that the technical standards of the Guidelines should be revised prior to final issuance of the new joint technical standards to be issued by the psychology profession. Such an action would be contrary to the history of cooperation with the professional community which has existed until now, and it would substantially alter the role of the Guidelines which reflects, rather than

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dictates, professional standards. EEOC does not intend to influence the open process by which the profession determines its standards by prematurely and unilaterally adopting changes in the UGESP based on what some individuals perceive as "new developments" in the field of psychological testing.

8. Coordination Authority [Under Reorganization Act and Executive Order 12067] --

This is one area of EEOC's responsibility that is frequently overlooked, but nonetheless is highly significant. Reorganization Act No. 1 of 1978 and Executive Order 12067 makes EEOC the lead federal agency in the area of equal employment opportunity. The Order specifically directs EEOC to review all federal statutes, Executive Orders, regulations and policies which concern equal employment opportunity. The Commission is to review these rules, to ensure consistency and uniformity among the family of federal agencies.

At the beginning of this year there was some confusion as to whether EEO promulgations would still have to be coordinated under Executive Order 12067 or was that order superseded by President Reagan's Executive Order 12291 on Regulatory Relief which was issued during the first few days of his Presidency. In a nutshell, that Executive Order requires agencies to conduct cost-benefit analyses to be reviewed by the Office of Management and Budget before promulgation of a major rule.

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In July, EEOC wrote OMB concerning its desire to ensure that the coordination of federal equal employment programs remain as effective as possible. Shortly thereafter, in August, based on OMB's response, EEOC and OMB entered into an agreement governing the sequence of reviews of agency regulatory issuances concerning equal employment opportunity. The agreement requires that EEOC complete its analysis of agency NPRM's (Notice of Proposed Rulemaking), final rules and information collection instruments under Executive Order 12067 before these issuances are submitted to OMB for review under Executive Order 12291 and the Paperwork Reduction Act. On August 26, these new procedures were sent to the heads of all federal agencies. Hence, today EEOC's coordination authority remains intact if not actually strengthened.

At the same time the Commission was negotiating with OMB, the Office of Federal Contract Compliance Programs of the Department of Labor announced that they intended to revise certain regulations enforcing Executive Order 11246. As most of you know this order makes it unlawful for government contractors and certain subcontractors to discriminate in employment. As required by Executive Order 12067, OFCCP did consult with EEOC albeit somewhat tardy on the changes it intended to make in its program.

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During the coordination process, EEOC objected to certain OFCCP proposed changes because cumulatively they created a dual standard for contractors -- one under Title VII and one under Executive Order 11246, a situation EEOC was charged with avoiding. In addition, EEOC was concerned that several of the Department of Labor proposals would have impeded the effectiveness of efforts to secure compliance. The Commission and the Department of Labor have spent the last several months attempting to negotiate our differences. Some of the issues follow:

A. Private Club Discriminatory Membership Policies

In July, OFCCP contacted the Commission to explain that it intended to withdraw earlier promulgated regulations dealing with payments by government contractors of membership fees to private clubs which discriminate in their membership policies. This problem is more common than one might think. For example, an employer may offer male executives the option of joining the local business luncheon club or a country club which has a policy of excluding women as members. The company will pay the respective membership fees of either organization. However, female executives at the same company might only have the option of joining the business luncheon club because of the discriminatory membership policy of the country club. On previous occasions the Commission had stated its position that such payments constitute a violation of Title VII of the Civil Rights Act.

However, in deference to the Department of Labor's desires the Commission did not object to the withdrawal of Labor's rule on the subject provided that the following sentence was added to the preamble to the withdrawal:

Accordingly, the Department will act upon complaints alleging that the payment by contractors of fees to private clubs which discriminate in membership has resulted in employment discrimination against an employee or applicant for employment (individual complaints received by OFCCP normally are forwarded for handling to the EEOC pursuant to a Memorandum of Understanding between the two agencies), and the Department will include an analysis of contractors' private club policies and practices as part of compliance reviews where appropriate.

The purpose of this language was to inform the public that OFCCP, and of course EEOC, would continue to investigate the payment of dues to discriminatory clubs in response to complaints and charges.

B. Thresholds for Developing Affirmative Action Plans

OFCCP has also proposed to increase the threshold levels for both dollar amounts and number of employees above which government contractors are required to develop written affirmative action plans. At present, an employer which has 50 employees and a government contract of \$50,000 must develop a written affirmative action plan. OFCCP proposes to change these thresholds to 250 employees and a threshold of a one million dollar contract. Thus, OFCCP would be increasing the threshold 20 fold for the dollar amount and 5 times for the number of employees. EEOC is concerned that this modification

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allows too many contractors to avoid affirmative action responsibilities. Our specific concern is that too many minorities and women would be left unprotected. According to OFCCP's own figures only one quarter of the government contractors would have to formulate AAP's and 74% of the employees now covered by the Executive Order would remain so.

The Commission's position has been that the 50,000 dollar figure first established in 1966 is today unrealistically low, and that number does need to be adjusted upward. Accounting for inflation over the past 15 years, that number should be more accurately about \$160,000. Accordingly, EEOC suggested to OFCCP as an alternative that it set the thresholds at 100 employees and a contract of \$250,000. At this level approximately half of the contractors would have to file AAP's and 95% of the employees would remain covered.

We believe the Commission's position is all the more reasonable in light of the fact that OFCCP now proposes to no longer aggregate or add individual contracts together in determining whether the dollar threshold has been met. Thus, a substantial business employing thousands of persons might receive 50 government contracts for a total of 40 million dollars. However, if all 50 contracts were for less than 1 million dollars under OFCCP's proposed regulations the contractor would not even have to prepare an affirmative action plan.

C. Backpay As A Remedy

The Commission is also concerned about OFCCP's suggestion that it seeks comments on the appropriateness of backpay under the Executive Order. The Commission's position is that backpay has been and continues to be perhaps the single most effective deterrent to discrimination. Any retreat from this form of relief would severely limit the options OFCCP has available to it in dealing with discriminating contractors. This is especially true in light of the Justice Department's position that numerical goals and timetables are inappropriate. Antidiscrimination agencies which are called upon to address a variety of different situations should have a full panoply of remedies available to them.

CONCLUSION

The purpose of this report was to inform you of the present status of the agency and the issues confronting it. Some of these future issues are managerial -- how to continue rapid charge production with decreased funds and fewer staff while others are more substantively based. EEOC will continue to meet both challenges in a forthright and dedicated manner which adheres to our mission. This is a good agency and it has been getting better. That is not to say it is faultless. We have shortcomings and will work hard to correct them. I believe the public recognizes that there is a continued need for EEOC and that it will survive intact.